No. 05-41[illegible] 2005

In The

Supreme Court of the United States

HARRY TROY SMITH,

Petitioner,

v.

BENJAMIN ANDERS OLSSON and
LARA KATHERINE OLSSON,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Fifth District Of Texas At Dallas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the due process component of the Fourteenth Amendment's equal protection clause permits a state to terminate a father's parental rights on the ground that the father's prior criminal conviction later endangered the child, when the father committed a crime in 1999, began serving his sentence shortly after the child's conception in 2000, became a model citizen after his release from incarceration in 2001, learned he had a child in 2002 and was terminated in 2003 based on his 1999 criminal act.

PARTIES

The petitioner is Harry Troy Smith. The respondents are Benjamin Anders Olsson and wife, Lara Katherine Olsson.

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The December 2, 2004, decision of the Court of Appeals of the Fifth District of Texas, which is reported at 152 S.W.3d 200 (Tex. App. 2004), is reprinted in the Appendix to the petition. (App. 1-14). The May 13, 2005, decision of the Texas Supreme Court, denying petition for review, which is not officially reported, is reprinted in the Appendix to the petition. (App. 19). The July 1, 2005, decision of the Texas Supreme Court, denying motion for rehearing, which is not officially reported, is reprinted in the Appendix to the petition. (App. 20). The October 15, 2003, decision of the 305th Judicial District Court of Dallas County, Texas, which is not officially reported, is reprinted in the Appendix to the petition. (App. 15-18).

STATEMENT OF JURISDICTION

The Texas Supreme Court denied a timely filed petition for review on May 13, 2005. (App. 19). The Texas Supreme Court denied a timely filed motion for rehearing on July 1, 2005. (App. 20). The jurisdiction of this Court rests on 28 U.S.C. § 1257.

STATUTE INVOLVED

Section 161.001 of the Texas Family Code (Vernon 2002) is reprinted in an appendix to the petition. (App. 21-25).

STATEMENT OF THE CASE

Petitioner Harry Troy Smith ("Mr. Smith") seeks review of the termination of his parental rights to Jamie Lynn Grace Wyrick ("Grace") at the behest of Benjamin and Lara Olsson ("Dr. Olsson" and "Ms. Olsson" or "the Olssons"), who are the intended adoptive parents of the child. Grace's biological mother is Deanna Wyrick ("Ms. Wyrick"). Ms. Wyrick relinquished her parental rights to Grace and is not a party to this proceeding.

The facts pertinent to this case originate in the 1990s when Mr. Smith began keeping disreputable company. One day, Mr. Smith and some friends flew from Dallas to El Paso, Texas, where one of Mr. Smith's then-acquaintances suggested that Mr. Smith smuggle some cocaine through the El Paso airport on his way back to Dallas. Mr. Smith attempted to walk the cocaine through the El Paso airport on May 19, 1999, by tucking it underneath his clothes at his lower back. Federal authorities apprehended Mr. Smith after searching him when the airport metal detector signaled. They arrested Mr. Smith for possession of a controlled substance with intent to distribute in excess of 500 grams. On February 23, 2000, after receiving Mr. Smith's guilty plea, the court sentenced Mr. Smith to thirty months, including six months in federal boot camp, twelve months in a halfway house and twelve months of home confinement. The court gave Mr. Smith a surrender date of May 15, 2000.

Not long before his surrender date, in March 2000, Mr. Smith began dating Ms. Wyrick. Ms. Wyrick was a cocaine user. On occasion, Mr. Smith drove Ms. Wyrick to pick up cocaine. Although Mr. Smith was about to go to boot camp, Mr. Smith and Ms. Wyrick decided they would

get married. They discussed having a child together, but they had unprotected sex on only three occasions. Mr. Smith and Ms. Wyrick broke up about two weeks before Mr. Smith reported to boot camp.

As it turned out, Ms. Wyrick had become pregnant by Mr. Smith. However, Mr. Smith did not know that Ms. Wyrick had become pregnant. Ms. Wyrick did not realize she had become pregnant until about six or seven months into the pregnancy. Ms. Wyrick delivered Grace on December 15, 2000.

After being released from boot camp, Mr. Smith completed his stay at the halfway house. He subsequently was released from community supervision eleven months early because of his good behavior and stable lifestyle. Once out of the halfway house, Mr. Smith needed somewhere to live. He contacted Jan Murphy, a Dallas-area real estate agent whom he had known prior to his incarceration. Ms. Murphy rented a room in her house to Mr. Smith. Over the next several months, Mr. Smith and Ms. Murphy fell in love. Mr. Smith still did not know he had a child.

Eventually, on May 22, 2003, Mr. Smith and Ms. Murphy (now "Ms. Smith") married. In the meantime, immediately after Grace's birth on December 15, 2000, the Texas Department of Community and Protective Services ("CPS") became involved with Grace and Ms. Wyrick because Ms. Wyrick admitted to using cocaine during the pregnancy, had a "long history of drug abuse," and Grace had been born prematurely. Ultimately, Respondents Dr. Olsson (who is Ms. Wyrick's half brother) and his wife agreed to accept the care of Grace.

Dr. and Ms. Olsson filed a petition to terminate the parental rights of Mr. Smith and Ms. Wyrick on July 18,

2002, in the 305th Judicial District Court of Dallas County, Texas. Ms. Wyrick relinquished her parental rights by affidavit filed August 14, 2002. The district court terminated Ms. Wyrick's parental rights that same day. The district court appointed the Olssons as temporary managing conservators of Grace in its Interlocutory Decree of Termination.

Ms. Wyrick identified Mr. Smith as Grace's father in an Affidavit of Status filed August 14, 2002, but she had no address for him. Nevertheless, the Olssons located Mr. Smith and served him with process by mail. Upon receipt of that letter, in mid-August 2001, Mr. Smith learned, for the first time, that he had become a father.

Mr. Smith filed a pro se answer to the termination petition on September 4, 2002, in which he expressed his delight at learning he was a father. To confirm paternity, Dr. Olsson requested that Mr. Smith submit to a DNA test, a request with which Mr. Smith complied.

On October 7, 2002, having retained counsel, Mr. Smith filed a Counter-Petition to Establish Parentage. The Olssons allowed Mr. Smith to meet his daughter for the first time in November 2002, at NorthPark Mall in Dallas, Texas. This visit marked the first of six informal visits. After court hearings in late December 2002 and early January 2003, the district court granted Mr. Smith visitation with Grace every Saturday for four hours and every other Wednesday night for two and one-half hours.

After Dr. Olsson graduated from medical school in the Spring of 2003, he and Ms. Olsson moved to Little Rock, Arkansas, in June so that Dr. Olsson could begin his residency. The following month, Dr. and Ms. Olsson had a child of their own, on July 10, 2003. But the move put a

stop to the Smiths' weekly Saturday visits and alternate Wednesday visits with Grace. Visitation changed to alternating weekends, one in Little Rock, then one in Dallas. Mr. Smith's visitation time equaled six hours on Saturday and six hours on Sunday. That visitation schedule – with which Mr. and Ms. Smith faithfully complied – stayed in effect until the time of trial, which began October 7, 2003.

At trial, no one disputed that Mr. Smith had turned his life around. Mr. Smith testified that he had left behind his former lifestyle when he departed for federal boot camp in May 2000. Mr. Smith testified that he had "come to a very, very clear understanding" that his former lifestyle was "not normal" and that he had been "messing up quite a bit." Mr. Smith repeatedly expressed contrition over his criminal conduct. He testified that he had "made a mistake." Further, "I can't even begin to tell you the ignorance of that." "I take responsibility for my actions." Even the Olssons' attorney conceded that Mr. Smith had cleaned up his life. Several witnesses testified to Mr. Smith's good character; none testified against him. The clinical psychologist retained by the Olssons testified he had found nothing to indicate that Mr. Smith would put his daughter "in any type of danger."

Mr. Smith's conduct since his 2000 stay in federal boot camp proved unblemished; the Olssons accordingly turned their attention to Mr. Smith's wife Jan Smith, the former Jan Murphy with whom Mr. Smith had fallen in love before he even knew he had become a father and whom he later married. The Olssons accused Ms. Smith of alcoholism. To support this allegation, they called Ms. Smith's daughter, Sherry Spillman ("Ms. Spillman"), as a witness. Ms. Spillman characterized her mother as an alcoholic and

said that she had been an alcoholic as far back as Ms. Spillman could remember. Ms. Spillman described her mother's drinking thus: "Just random. I mean, different times. I mean, no set, certain time." Ms. Spillman, who was forty-one years of age at the time of trial, remained angry with her mother for drinking on her birthday nearly a generation ago, when Ms. Spillman was twelve or thirteen years old. Ms. Spillman also testified that Ms. Smith hit her, her sister, or Ms. Smith's then-husband in 1971 and also "held her father at gunpoint." Ms. Smith and her former husband divorced in 1991 or 1992. Ms. Smith admitted to having some problems with alcohol during that marriage and through that divorce; Ms. Smith testified that her then-husband had been abusive to her. But even Ms. Spillman conceded that she knew of nothing Ms. Smith had done to jeopardize Grace. The Olssons did not claim that Ms. Smith ever had used alcohol or been under its influence when she and Mr. Smith visited Grace.

The Olssons and Mr. Smith – by this time pro se again, for lack of funds – tried the case to a jury. The jury concluded that Mr. Smith had engaged in conduct that endangers the physical or emotional well-being of a child and that termination of Mr. Smith's parental rights to Grace would be in Grace's best interest, as set forth in Texas Family Code section 161.001. (App. 21-25). The district court accordingly signed Judgment on the Verdict of the Jury. (App. 15-18). In his Motion for Judgment Non Obstante Veredicto, Mr. Smith raised the constitutional issues he would have this Court decide. (App. 28-29). The district court denied this Motion on January 8, 2004. (App. 31). The Court of Appeals of the Fifth District of Texas affirmed the district court but did not mention any constitutional issues. (App. 1-14). The Texas Supreme Court

denied Mr. Smith's Petition for Review and his Motion for Rehearing without comment. (App. 19, 20).

At trial, Mr. Smith asked Dr. Olsson, a pediatric resident, "How am I supposed to compete with you?" "How is anybody supposed to keep their children if they have to compete against you?" That plaintive cry – and the practice of terminating parental rights to allow placement with a "better" family – form the basis for this petition for certiorari.

REASONS FOR GRANTING THE PETITION

This Court long has recognized that the liberty interest of parents "in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville,* 530 U.S. 57, 65 (2000) (citing *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923)). This liberty interest may not be taken without due process of law, both procedural and substantive. *E.g., Washington v. Glucksberg,* 521 U.S. 702 (1997); *Quilloin v. Walcott,* 434 U.S. 246 (1978). For these reasons, the Fourteenth Amendment's due process component requires that parental rights may be terminated only upon proof of facts warranting termination by clear and convincing evidence. *Santosky v. Kramer,* 455 U.S. 745 (1982).

Texas' statute permits termination of parental rights when a parent has "engaged in conduct ... which endangers the physical or emotional well-being of the child" and "termination is in the best interest of the child." Tex. Fam. Code §§ 161.001(1)(E) & (2) (App. 21, 25). In construing

this provision, the Texas Supreme Court has made clear that "mere imprisonment will not, standing alone, constitute engaging in conduct which endangers the emotional or physical well-being of a child." *Texas Department of Human Services v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Termination may occur only when "the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child." *Id.* at 534. The Texas Supreme Court has held that in addition, it must be shown – again by clear and convincing evidence – that "termination is in the best interest of the child." *Richardson v. Green*, 677 S.W.2d 497, 499 (Tex. 1984).

The Court should grant this petition because Texas Family Code section 161.001(1)(E) violates the substantive due process component of the Fourteenth Amendment's equal protection clause to the extent that the statute permits a fundamental liberty interest to be taken based on actions that bear only a tenuous relationship – if they bear any relationship at all – to the statute's proscriptions. Mr. Smith committed a crime and pled guilty to it before his child was conceived. He served his sentence and became a model citizen before he even knew he had a child. Once he learned that he had become a father, he and Ms. Smith visited his daughter on every possible occasion. To say that Mr. Smith's 1999 criminal conduct endangered Grace in 2003 is – at best – conjecture. The Constitution does not permit termination of parental rights based on conjecture.

To the extent that the termination of Mr. Smith's parental rights rests on a "course of conduct," that course of conduct consisted of (1) Mr. Smith's pre-conception criminal violation; (2) Mr. Smith's brief relationship with

Ms. Wyrick prior to reporting to boot camp when, unknown either to Mr. Smith or to Ms. Wyrick, Ms. Wyrick conceived Grace; and (3) Mr. Smith's marriage to Ms. Smith, a woman whose daughter accused her of alcoholism but who also admitted in court that Ms. Smith had done nothing to jeopardize the child. If there is any nexus between these events and any danger to Grace, it is so attenuated that due process does not allow these facts to constitute clear and convincing evidence of endangerment to Grace. Moreover, the termination statute requires proof of endangering conduct on the part of Mr. Smith, not Ms. Smith. It would be appalling if termination of a father's parental rights could rest upon the unfortunate events surrounding a stepmother's long-ago, prior marriage and upon accusations of alcoholism when no one claimed that the stepmother had done anything to endanger the child.

The "endangerment" portion of Texas' termination statute is so broad that it actually operates to allow termination of parental rights so that a child can be adopted by a "better" family. Under the terms of the statute, "endangerment" can be proved by nearly any act, even a legal act, so long as that act can be shown to "endanger the physical or emotional well-being of the child." Tex. Fam. Code § 161.001(1)(E). For example, could it not be said that the use of tobacco in the presence of a child constitutes "endangerment?" Some would say that corporal punishment endangers a child, even if only emotionally, a consequence forbidden by Texas' termination statute. (App. 21). As in the case before the Court, as construed, the statute permits an "endangerment" finding when a father suffers a criminal conviction prior to the child's birth but rehabilitates himself before he even knows he has a child.

As a practical matter, because "endangerment" is so easy to prove to a willing fact-finder, Texas' statute permits a court to give a child to the family the fact-finder prefers. This Court addressed a closely related issue in *Troxel v. Granville,* 530 U.S. 57 (2000), where the Court condemned the state's infringement on a parent's fundamental rights to rear his children "simply because a state judge believes a 'better' decision could be made." *Id.* at 73.

As part of its decision whether the Court grants this petition, the Court doubtless will consider whether there were independent and adequate grounds for the lower courts' decisions. *See Murdock v. City of Memphis,* 187 U.S. 590 (1875). The district court's charge to the jury included six grounds for termination which tracked certain of the grounds set forth in Texas Family Code section 161.001. Mr. Smith attacked all grounds for termination on appeal. In its opinion, the Court of Appeals of the Fifth District of Texas considered only the "endangerment" ground because if any ground for termination were upheld, then termination would be appropriate. (App. 1). However, every one of the termination grounds except the "endangerment" ground required voluntary and/or knowing conduct by Mr. Smith toward Grace. Tex. Fam. Code §§ 161.001(1)(A)-(E) & (H). (App. 21, 22). None of these alternative grounds will prove efficacious should this case be reversed: Mr. Smith did not even know of Grace's existence until well after he was released from the halfway house as part of the sentence for a crime Mr. Smith committed before Grace even was conceived.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AFFIRM; Opinion Filed December 2, 2004.

[LOGO]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-03-01582-CV

IN THE INTEREST OF J.W., A CHILD

On Appeal from the 305th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 02-00726-X

OPINION

Before Justices O'Neill, Lang, and Lang-Miers
Opinion by Justice Lang

Harry Smith appeals the trial court's judgment, following a jury trial, terminating the parental rights to his daughter, J.W. In seven issues, Smith argues that the evidence was legally and factually insufficient to support the trial court's judgment. Because we conclude that (1) Smith engaged in conduct that endangered the child's physical or emotional well-being, and (2) termination is in the child's best interest, we resolve these issues against Smith and affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In February 2000, Smith was convicted of attempting to smuggle cocaine and sentenced to thirty months in federal boot camp. Before he was to surrender into custody in May 2000, Smith began a sexual relationship with Deanna Wyrick. Smith and Wyrick expressly desired to conceive a child, and, although unaware of the pregnancy until September or October 2000, Wyrick did become pregnant by Smith. During their relationship, Smith knew that Wyrick was using drugs, and, on more than one occasion, drove Wyrick to the necessary places for her to obtain drugs. Wyrick, who continued to use drugs during the balance of the pregnancy, gave birth to J.W. in December 2000.

In 2001, Child Protective Services removed J.W. from Wyrick's custody. Seven weeks later, J.W. was placed in the home of appellees, Benjamin and Lara Olsson. Smith did not learn of his daughter's birth until he received a letter from the Olssons in August 2002, along with the Olssons' petition for termination. Smith responded, in his original answer, by requesting possession of J.W.

The Olssons provided Smith access to the child, without a court order, from September to December 2002. Following a temporary hearing in January 2003, the trial court ordered access for Smith twice each week. The Olssons moved to Arkansas in June 2003.

At trial, evidence was presented that Smith had been a supplier of illegal drugs to numerous drug houses. Smith testified that he "had friends and associates who sold drugs, and would go with them when they sold drugs." However, Smith testified that, since his release from federal boot camp in 2000, he left his former lifestyle

behind. Also, he presented witnesses to testify to his present good character.

In May 2003, Smith married Jan Murphy. Murphy was accused at trial of being an alcoholic. Murphy's daughter and granddaughter testified regarding Murphy's alcoholism and tendency to be physically violent. In particular, Murphy's daughter, Sherry Spillman, testified regarding one episode in which Murphy, during a heated argument, held a gun to the head of her former husband.

At the conclusion of trial, the jury found, by clear and convincing evidence, at least one of the enumerated requirements for terminating the parent-child relationship under family code section 161.001(1), and, under family code section 161.001(2), termination was in J.W.'s best interest.

II. STANDARD OF REVIEW

Termination of parental rights is a drastic remedy and is of such weight and gravity that due process requires the petitioner to justify termination by clear and convincing evidence. TEX. FAM. CODE ANN. § 161.206(a) (Vernon 2002); *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002). The clear and convincing standard creates a higher burden to fulfill because of the severity and permanency of terminating the parent-child relationship. *In re J.N.R.*, 982 S.W.2d 137, 141 (Tex. App. – Houston [1st Dist.] 1998, no pet.). Accordingly, an appellate court must also have a higher standard when reviewing the legal and factual sufficiency of the evidence. *In re J.F.C.*, 96 S.W.3d at 264-65; *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002).

In reviewing the legal sufficiency of the evidence to support a termination finding, this court looks at all the evidence, in the light most favorable to the finding, to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.F.C.*, 96 S.W.3d at 266. In doing so, we presume that the factfinder settled disputed facts in favor of the finding if a reasonable factfinder could do so. *Id.* As a corollary, we disregard all evidence that a reasonable factfinder could have disbelieved or found incredible. *Id.*

When reviewing the factual sufficiency of the evidence supporting a termination finding, we inquire as to whether all the evidence, both in support of and contrary to the trial court's finding, is such that a factfinder could reasonably form a firm belief or conviction about the truth of the petitioner's allegations. *In re C.H.*, 89 S.W.3d at 27-29. Further, we consider whether the disputed evidence is such that a reasonable factfinder could not have reconciled that disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266. If the disputed evidence is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

III. TERMINATING THE PARENT-CHILD RELATIONSHIP

Section 161.001 of the Texas Family Code permits a court to order termination of parental rights if two elements are established. TEX. FAM. CODE ANN. § 161.001 (Vernon 2002). First, the parent must have engaged in *any one* of the acts or omissions itemized in the first subsection of the statute. *Id.* § 161.001(1); *Dupree v. Tex. Dep't of*

Protective & Regulatory Servs., 907 S.W.2d 81, 86 (Tex. App. – Dallas 1995, no writ). Second, termination of the parent-child relationship must be in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(2); *In re J.R.K.*, 104 S.W.3d 341, 342 (Tex. App. – Dallas 2003, no pet.).

A. Endangerment

In Smith's fifth issue, he claims that there was no evidence or, in the alternative, insufficient evidence to support the jury's finding that he engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child. *See* TEX. FAM. CODE ANN. § 161.001(1)(E). Subsection (E)'s provisions are different in several respects from the other enumerated acts in section 161.001(1). Under subsection (E), the court may terminate the parent-child relationship if it finds, by clear and convincing evidence, that the parent has engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child. *Id.*

The parent need not know of the child's existence in order to support a finding under subsection (E). *Clark v. Clark*, 705 S.W.2d 218, 219 (Tex. App. – Dallas 1985, writ dism'd); *see also In re M.D.S.*, 1 S.W.3d 190, 198 (Tex. App. – Amarillo 1999, no pet.) (finding that section 161.001(1)(E) "requires only that the parent's conduct endanger the child."). To constitute endangerment, it is not necessary that the conduct be directed at the child or that the child actually suffer injury. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Rather, it is sufficient that the child is exposed to loss or injury. *Id.*

Subsection (E) requires us to look at the parent's conduct alone, including actions or omissions. *In re D.J.*, 100 S.W.3d 658, 662 (Tex. App. – Dallas 2003, pet. denied); *In re D.M.*, 58 S.W.3d 801, 811 (Tex. App. – Fort Worth 2001, no pet.). It is inconsequential that the parent's conduct occurred before the child's birth. *In re U.P.*, 105 S.W.3d 222, 229 (Tex. App. – Houston [14th Dist.] 2003, pet. filed); *In re D.M.*, 58 S.W.3d at 812. Instead, we look to the parent's conduct both before and after the child's birth to determine whether termination is appropriate. *In re D.M.*, 58 S.W.3d at 812. Further, termination under subsection (E) must be based on more than a single act or omission. *Id.*; *In re D.T.*, 34 S.W.3d 625, 634 (Tex. App. – Fort Worth 2000, pet. denied). A voluntary, deliberate, and conscious "course of conduct" by the parent, that endangers the child's physical and emotional well-being, is required. *Dir. of Dallas County Child Protective Servs. v. Bowling*, 833 S.W.2d 730, 733-34 (Tex. App. – Dallas 1992, no writ.); *In re D.M.*, 58 S.W.3d at 812; *In re D.T.*, 34 S.W.3d at 634.

Imprisonment, standing alone, does not constitute "engaging in conduct which endangers the physical or emotional well-being of the child." It is, however, a fact properly considered on the issue of endangerment. *Boyd*, 727 S.W.2d at 533-34; *In re D.T.*, 34 S.W.3d at 635-36. The petitioner need not show that imprisonment was a result of a course of conduct that endangered the child. Rather, it must only be shown that imprisonment was a part of a course of conduct endangering the child. *In re D.M.*, 58 S.W.3d at 812. Thus, if the evidence, including imprisonment, proves a course of conduct that has the effect of endangering the child's physical or emotional well-being, a

finding under subsection (E) is supportable. *Boyd*, 727 S.W.2d at 533-34.

1. Legal Sufficiency Analysis

The undisputed evidence shows that Smith, before his relationship with Wyrick, was involved with a group of people who used and dealt cocaine. During this time, Smith was convicted of attempting to smuggle cocaine and sentenced to thirty months in federal boot camp. Knowing he was soon going to be surrendering to federal authorities, Smith began a sexual relationship with Wyrick in which the two of them expressly desired to conceive a child.

Wyrick testified that, at the time they were attempting to conceive, Smith knew of her past drug use and her active cocaine use. Also, she testified that while they intentionally attempted to conceive, Smith was not personally using cocaine, but supplied her with cocaine. It is undisputed that, during their relationship, Smith took her to numerous places to buy drugs.

The evidence is undisputed that Smith did go to federal boot camp. Thereafter, Wyrick continued to use cocaine for the first six to seven months of the pregnancy. Child Protective Services became involved when Wyrick admitted using cocaine during the pregnancy. When Wyrick continued to use drugs after the pregnancy, J.W. was put in a foster home and later placed with the Olssons.

Smith contends that, toward the end of their relationship, Wyrick told him that she had a heavy menstrual period lasting approximately ten days, which he assumed

to be a miscarriage. Accordingly, Smith contends that he was not attempting to conceive a child after the heavy period, and that only after this apparent miscarriage did he actually take her to various places to buy drugs. Nonetheless, Wyrick became pregnant. Additionally, the jury was presented with Wyrick's testimony in which she flatly denied ever telling Smith that she had a heavy menstrual period. Also, she testified that given her physical condition, such a menstrual period would have been impossible.[1]

Other than the conflicting evidence as to Wyrick's menstrual period, the evidence outlined above is not disputed. We do not deem the conflicting evidence as to whether or not Wyrick had a menstrual period to bear on the issue of the otherwise undisputed evidence of Smith's conduct. Accordingly, when the evidence is viewed in the light most favorable to the trial court's judgment, it is legally sufficient to support a finding under subsection (E) of the statute. *See Bowling*, 833 S.W.2d at 733-34; *see also In re W.J.H.*, 111 S.W.3d 707, 717-18 (Tex. App. – Fort Worth 2003, pet. denied).

2. Factual Sufficiency Analysis

In our factual sufficiency review, we must ascertain what disputed evidence, if any, exists as to the conduct in question. The only possibly relevant disputed fact is whether Wyrick had a heavy menstrual period that could have signified a miscarriage. As previously discussed, Smith argues that Wyrick told him that she had a heavy

[1] Wyrick testified that, "I don't even know where [he is] coming up with this."

menstrual period, which he believed to be a miscarriage. However, Wyrick denies ever having such a menstrual period.[3]

Given this conflicting testimony, this Court will not substitute our judgment for that of the jury's. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003) ("[T]he jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony."). We do not deem Smith's argument on the disputed menstrual period to be significant to the issue of endangerment. The jury heard all the evidence as to Smith's drug involvement and criminal conviction, his active attempt to conceive a child with a woman he knew to be actively engaged in cocaine use, and his facilitation of Wyrick's cocaine acquisition.

Viewing all the evidence in a neutral light, both in favor of and contrary to the trial court's judgment, we conclude that there is factually sufficient evidence to support the jury's finding that Smith engaged in a course of conduct endangering J.W.'s physical and emotional well-being. *See Bowling*, 833 S.W.2d at 733-34; *see also In re W.J.H.* 111 S.W.3d at 707. Accordingly, we decide against Smith on his fifth issue.

Because we conclude that the evidence is both legally and factually sufficient to support the jury's findings under subsection (E), and a finding as to any one of the acts or omissions enumerated in section 161.001(1) is sufficient to support termination, we need not address Smith's other five issues regarding any of the alternative

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[3] See supra note 1.

acts or omissions enumerated in section 161.001(1). *See* TEX. FAM. CODE ANN. § 161.001(2); *Dupree*, 907 S.W.2d at 86. However, we must address Smith's seventh issue, as to whether termination is in J.W.'s best interest. *Dupree*, 907 S.W.2d at 86.

B. Best Interest of the Child

In his seventh issue, Smith contends that the evidence is legally and factually insufficient to support the jury's finding that terminating the parent-child relationship is in J.W.'s best interest. In conducting our examination of the sufficiency of the evidence to support the jury's finding that termination is in the child's best interest, we are mindful that there is a strong presumption that the child's best interest is served by keeping custody in the natural parent. TEX. FAM. CODE ANN. § 161.001(2); *In re J.R.K.*, 104 S.W.3d at 342; *In re K.C.M.*, 4 S.W.3d 392, 393-95 (Tex. App. – Houston [1st Dist.] 1999, pet. denied); *Ziegler v. Tarrant County Child Welfare Unit*, 680 S.W.2d 674, 676 (Tex. App. – Fort Worth 1984, writ ref'd n.r.e.). However, the factfinder may consider a number of factors in determining the best interest of the child: (1) the desires of the child; (2) the present and future physical and emotional needs of the child; (3) the present and future emotional and physical danger to the child; (4) the parental abilities of the person seeking custody; (5) programs available to assist those persons in promoting the best interest of the child; (6) plans for the child by those individuals or by the agency seeking custody; (7) stability of the home or proposed placement; (8) the parent's acts or omissions which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the parent's acts

or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

The absence of evidence about some of these considerations will not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest. *In re C.H.*, 89 S.W.3d at 27. On the other hand, the presence of scant evidence relevant to each *Holley* factor will not support such a finding. *Id.* Importantly, termination should not be used to merely reallocate a child to better and more prosperous parents. *In re W.E.C.*, 110 S.W.3d 231, 240 (Tex. App. – Fort Worth 2003, no pet.).

1. Legal Sufficiency Analysis

In our legal sufficiency review, we are required to look at all the evidence, in the light most favorable to the jury's finding. Smith claims we should recognize that, since being released from boot camp, Smith abandoned his former lifestyle. He is no longer involved with drugs, has become a real estate agent, and has remarried. However, we note that less favorable to Smith is the evidence which demonstrates that his new wife, Murphy, may pose a risk to J.W. The jury heard the testimony of Murphy's daughter, Sherry Spillman, as well as Murphy's granddaughter, Casey Spillman, both of whom attested to Murphy's ongoing alcohol abuse and her tendency to be physically violent. Sherry Spillman testified that, on one occasion, Murphy held a gun to her former husband's head. Also, Sherry Spillman said that on numerous occasions, Murphy has had physical altercations with her and her siblings.

Additional facts, not directly related to Smith's conduct, must be considered. At trial, two separate psychologists

testified as to the possible effects of removing J.W. from the Olssons and placing her with Smith. One psychologist, Dr. Odis, testified that Smith had "excessive self focus," and that his tendency to view things too much from his own perspective could create some difficulties with respect to his parenting. Additionally, although conceding that Smith would not be any kind of danger to J.W., Dr. Odis expressed concern about Smith's ability to provide a stable, secure and safe home for J.W. Another psychologist, Dr. Bontempo, testified that disrupting J.W.'s current placement would be "very, very devastating." More specifically, Dr. Bontempo testified that J.W. is securely attached to the Olssons, and removing her from that environment would have significant physical and emotional consequences. Dr. Bontempo gave her opinion that, given her already vulnerable state, the child should not be removed from the Olssons.

Also, the Olssons testified at trial. Ben Olsson recently graduated from medical school and accepted a residency at Arkansas Children's Hospital. Lara majored in child development and family studies, and is the assistant director of a child care center in Little Rock, Arkansas. Neither Ben nor Lara Olsson have any drug, alcohol, or criminal history. A pre-adoptive screening, conducted by a licensed professional, concluded that not only was J.W. very bonded to the Olssons, but also that there was no reason to doubt the Olssons' parenting ability.

We conclude that the evidence, viewed in the light most favorable to the jury's finding, is legally sufficient to support the jury's finding that terminating the parent-child relationship is in J.W.'s best interest. *In re J.F.C.*, 96 S.W.3d at 266.

2. Factual Sufficiency Analysis

In our factual sufficiency inquiry, we look at all the evidence, both in support of and contrary to the finding, to see if the jury "could reasonably form a firm belief or conviction" that terminating Smith's parental rights is in J.W.'s best interest. Smith asks us to consider that he testified Murphy is no longer an alcoholic. He contends that Sherry Spillman's testimony about Murphy is biased because of failed business dealings between the two of them. Smith points to lay witness testimony of the good character of both him and Murphy. This testimony came from friends and business associates, stating that Smith would not do anything to endanger his child, and that he is an honest person.

It is not for this Court to evaluate the credibility of the witnesses. Weighing the credibility of the witnesses is within the sole province of the jury. *Golden Eagle Archery, Inc.*, 116 S.W.3d at 761. Accordingly, we cannot agree with Smith that the evidence was such that the jury would be unreasonable in believing the evidence in favor of terminating the parent-child relationship. We conclude that the evidence is factually sufficient to support the jury's finding that terminating the parent-child relationship is in J.W.'s best interest. *In re C.H.*, 89 S.W.3d at 27-29. Smith's seventh issue is decided against him.

CONCLUSION

For the reasons set out above, we conclude that the evidence would allow a reasonable jury to form a firm belief or conviction that Smith (a) engaged in conduct that endangered J.W.'s physical or emotional well-being, and that (b) termination of the parent-child relationship was in

J.W.'s best interest. The evidence is legally and factually sufficient. Having resolved these two issues against Smith, we need not address his other five issues. The trial court's judgment is affirmed.

/s/ Douglas S. Lang
DOUGLAS S. LANG
JUSTICE

CAUSE NUMBER 02-726-X-305TH

IN THE INTEREST OF	IN THE 305TH JUDICIAL
JAMIE LYNN GRACE WYRICK	DISTRICT COURT OF
A CHILD	DALLAS COUNTY, TEXAS

JUDGMENT ON THE VERDICT OF THE JURY

On the 7th day of October, 2003, came to be heard a trial in this cause pertaining to the subject child, Jamie Lynn Grace Wyrick, a female child born on December 15, 2000 in Dallas County, Texas.

The Petitioners, Benjamin Anders Olsson and Lara Katherine Olsson, appeared in person and by counsel, David Cole, and announced ready.

The Respondent, Harry Troy Smith, appeared in person and announced ready.

Holly Schreier, the Attorney/Guardian Ad Litem appointed by the Court to represent the children the subject of this suit, appeared in person.

The Court, having examined the pleadings and heard the evidence and argument of counsel, finds that it has jurisdiction of this cause and of all the parties and that no other Court has continuing exclusive jurisdiction of this cause. All persons entitled to citation were properly cited. Thereupon a jury of twelve persons was impaneled and sworn and after hearing the evidence and receiving the Charge of the Court, said jury on the 10th day of October, 2003, retired to consider their verdict and answered the following question and returned a verdict in open court answering the question as follows:

QUESTION NUMBER ONE

Should the parent-child relationship between Harry Troy Smith, and the subject child, JAMIE LYNN GRACE WYRICK, be terminated based upon the instruction for Question Number One?

ANSWER: *YES*

Said verdict and answer of the jury being signed by eleven of the twelve jurors impaneled as herein set forth, and such verdict having been submitted in accordance with the instructions of the Court in its Charge incorporated by reference herein, such verdict was received and accepted by the Court and the jury ordered discharged.

In accordance with the findings of the jury on the questions as submitted, the Court finds that it would be in the best interest of the subject child, JAMIE LYNN GRACE WYRICK, a female child born on December 15, 2000 in Dallas County, Texas, that the Petitioners, Benjamin Anders Olsson and Lara Katherine Olsson, be granted the relief as prayed for herein.

IT IS, THEREFORE, ORDERED AND DECREED that the parent-child relationship between the father, Harry Troy Smith, and the subject child, JAMIE LYNN GRACE WYRICK, be and is hereby terminated.

The Court further finds that the best interest of the subject child, JAMIE LYNN GRACE WYRICK, will be served by appointing the Petitioners, Benjamin Anders Olsson and Lara Katherine Olsson, as the Permanent Managing Conservators of the subject child, JAMIE LYNN GRACE WYRICK.

IT IS, THEREFORE, ORDERED AND DECREED by the Court that the Petitioners, Benjamin Anders Olsson and Lara Katherine Olsson, be and are hereby appointed the Permanent Managing Conservators of the subject child, JAMIE LYNN GRACE WYRICK. The Permanent Managing Conservators shall have all the privileges, rights, duties, and powers enumerated in Sections 153.371 of the Texas Family Code, as amended.

The Court further finds that the parental rights the mother, Deanna Wyrick, had in and to the subject child, JAMIE LYNN GRACE WYRICK, were terminated in interlocutory orders entered in the above styled and numbered cause on August 14, 2002.

IT IS ORDERED AND DECREED by the Court that the interlocutory orders entered in the above styled and numbered cause on August 14, 2002, terminating the parental rights the mother, Deanna Wyrick, had in and to the subject child, JAMIE LYNN GRACE WYRICK, be and are hereby incorporated herein and made final.

IT IS ORDERED AND DECREED by the Court that all relief requested in this cause and not specifically granted herein be and it is hereby expressly denied.

All costs of court expended in this cause are taxed against the party incurring the costs, for which let execution issue.

Without affecting the finality of this Decree, this Court expressly reserves the right to make orders necessary to clarify and enforce this decree.

SIGNED THIS THE 15 DAY OF Oct., 2003.

/s/ Cheryl Lee Shannon
JUDGE PRESIDING

APPROVED AS TO FORM:

/s/ David Cole
David Cole
Counsel for Petitioners

/s/ Holly Schreier
Holly Schreier
Attorney/Guardian Ad Litem

Harry Troy Smith
Respondent

[SEAL] **OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS**

RE: Case No. 05-0120
COA #: 05-03-01582-CV
STYLE: IN THE INTEREST OF J.W.
DATE: 5/13/2005

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO: MR. JIMMY L. VERNER JR.
VERNER & BRUMLEY P C
3131 TURTLECREEK BLVD
SUITE 1020
DALLAS TX 75219

[SEAL] **OFFICIAL NOTICE FROM SUPREME COURT OF TEXAS**

RE: Case No. 05-0120
COA #: 05-03-01582-CV
STYLE: IN THE INTEREST OF J.W.
DATE: 7/1/2005

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO: MR. JIMMY L. VERNER JR.
VERNER & BRUMLEY P C
3131 TURTLECREEK BLVD
SUITE 1020
DALLAS TX 75219

Texas Family Code § 161.001 (Vernon 2002)

INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:

(1) that the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Education Code; or

(ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;

(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:

(i) Section 19.02 (murder);

(ii) Section 19.03 (capital murder);

(iii) Section 19.04 (manslaughter);

(iv) Section 21.11 (indecency with a child);

(v) Section 22.01 (assault);

(vi) Section 22.011 (sexual assault);

(vii) Section 22.02 (aggravated assault);

(viii) Section 22.021 (aggravated sexual assault);

(ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(x) Section 22.041 (abandoning or endangering child);

(xi) Section 25.02 (prohibited sexual conduct);

(xii) Section 43.25 (sexual performance by a child); and

(xiii) Section 43.26 (possession or promotion of child pornography);

(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;

(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services or an authorized agency for not less than six months, and:

(i) the department or authorized agency has made reasonable efforts to return the child to the parent;

(ii) the parent has not regularly visited or maintained significant contact with the child; and

(iii) the parent has demonstrated an inability to provide the child with a safe environment;

(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:

(i) failed to complete a court-ordered substance abuse treatment program; or

(ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

(Q) knowingly engaged in criminal conduct that has resulted in the parent's:

(i) conviction of an offense; and

(ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;

(R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by Section 261.001; or

(S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child; and

(2) that termination is in the best interest of the child.

NO. 02-00726

IN THE INTEREST OF	§	**IN THE DISTRICT**
JAMIE LYNN GRACE WYRICK	§	**COURT**
	§	
A CHILD	§	**305TH JUDICIAL**
	§	**DISTRICT**
	§	
	§	**DALLAS COUNTY,**
	§	**TEXAS**

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

COMES NOW Harry Troy Smith, and files this, his Motion for Judgment Non Obstante Veredicto, as follows:

1. This case was tried to a jury which returned a verdict on October 10, 2003.

2. The Court signed a Judgment on the Verdict of the Jury on October 15, 2003.

No Evidence Issues

3. There was no evidence to support the jury's finding that Respondent voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth.

4. There was no evidence to support the jury's finding that Respondent voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return.

5. There was no evidence to support the jury's finding that Respondent voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months.

6. There was no evidence to support the jury's finding that Respondent voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months.

7. There was no evidence to support the jury's finding that Respondent engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangered the physical or emotional well-being of the child.

8. There was no evidence to support the jury's finding that Respondent knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endangered the physical or emotional well-being of the child.

9. There was no evidence to support the jury's finding that termination of Respondent's parental rights was in the best interest of the child.

Error In Charge

10. The Court erred in failing to charge the jury that at least ten of them must agree on any single ground for termination.

Constitutional Issues

11. Permitting the termination of parental rights upon a finding that "Respondent engaged in conduct . . . which endangered the physical or emotional well-being of the child" is unconstitutional under the due course provision of Article 1, Section 19 of the Texas Constitution and under the due process clause of the 14th Amendment to the United States Constitution because the standard set forth for termination is so vague that it is unclear what conduct is prohibited.

12. Permitting the termination of parental rights upon a finding that "Respondent engaged in conduct . . . which endangered the physical or emotional well-being of the child" is unconstitutional under the due course provision of Article 1, Section 19 of the Texas Constitution and under the due process clause of the 14th Amendment to the United States Constitution because the standard set forth for termination is overly broad in that it would permit the termination of parental rights based upon legal and innocuous conduct as well as upon conduct that actually endangers a child.

13. Permitting the termination of parental rights upon a finding that "Respondent engaged in conduct . . . which endangered the physical or emotional well-being of the child" is unconstitutional under the due course provision of Article 1, Section 19 of the Texas Constitution and under the due process clause of the 14th Amendment to the United States Constitution to the extent that termination can be based upon conduct not directed at the child, conduct not occurring in the presence of the child, and/or conduct predating the birth or conception of the child or any knowledge of a child by a Respondent because the

standard set forth for termination does not adequately warn a person of what conduct is prohibited.

14. The evidence at trial relied heavily upon Respondent's federal narcotics conviction despite the fact that Respondent was convicted, incarcerated, then released from incarceration, all of which took place prior to the birth of the child. Reliance upon this evidence for purposes of termination of parental rights violates the cruel and unusual punishment clauses of Article I, Section 13 of the Texas Constitution and of the 8th Amendment to the United States Constitution.

15. The evidence at trial relied heavily upon Respondent's federal narcotics conviction despite the fact that Respondent was convicted, incarcerated, then released from incarceration, all of which took place prior to the birth of the child. Reliance upon this evidence for purposes of termination of parental rights violates the double jeopardy clauses of Article 1, Section 14 of the Texas Constitution and of the 5th Amendment to the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, Harry Troy Smith prays that the Court grant him judgment notwithstanding the verdict of the jury and that the proceedings for termination of his parental relationship with the child be dismissed with prejudice. Harry Troy Smith prays for general relief.

Respectfully submitted,

/s/ Jimmy L. Verner, Jr.
Jimmy L. Verner, Jr.
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Certificate of Service

I certify that I served a true and correct copy of the above and foregoing document upon:

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Holly Schreier
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by the following means:

- ☒ facsimile
- ☐ hand-delivery
- ☐ certified mail, return receipt requested

on November 11, 2003.

/s/ Jimmy L. Verner, Jr.
Jimmy L. Verner, Jr.

Excerpt from Docket Sheet
305th Judicial District Court of Dallas County, Texas

ORDERS

1/8/04 Petitioner Atty, RP & atty AAL CLS

Motion for New Trial & Motion Notwithstanding Verdict is denied.